(26,723)

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1918.**

# No. 637.

THE NEW YORK CENTRAL RAILROAD COMPANY, PETITIONER,

*vs.*

WILBUR H. MOHNEY.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, STATE OF OHIO.**

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 15, 1919.

1 Certified Copy

In the Court of Appeals of Lucas County.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

CERTIFIED COPY OF RECORD.

Doyle & Lewis, Attorneys for Plaintiff in Error.
Miller, Miller, Brady & Seeley, Attorneys for Defendant in Error.

Filed Apr. 10, 1918. Supreme Court of Ohio, Frank E. McKean, Clerk.

Office Supreme Court, U. S. Filed Aug. 26, 1918. James D. Maher, Clerk.

2-4 In the Court of Appeals of Lucas County, Ohio.

*Petition in Error.*

(Filed July 3, 1917.)

Now comes the plaintiff in error, The New York Central Railroad Company, and says that at the April, 1917 Term of the Court of Common Pleas of Lucas County, Ohio, the defendant in error, Wilbur H. Mohney, recovered a judgment by the consideration of said Court of Common Pleas against the plaintiff in error, in an action pending in said Common Pleas Court, wherein the plaintiff in error was defendant, and said defendant in error was plaintiff.

A duly certified transcript of the docket and journal entries herein and together with the original pleadings, papers and bill of exceptions are filed herewith.

Plaintiff in error avers that there is error in said record, proceedings and judgment of said Court of Common Pleas, prejudicial to this plaintiff in error in each of the following particulars, to-wit:

(1) Said court erred in giving judgment in favor of the defendant in error, when it should have been given in favor of plaintiff in error.

5 (2) The finding and decision of said Court of Common Pleas is not sustained by sufficient evidence.

(3) The finding and decision of said Court of Common Pleas is not sustained by any evidence.

(4) The finding and decision of said Court of Common Pleas is against the weight of the evidence.

(5) The finding and decision of said Court of Common Pleas is contrary to law.

(6) Said Court of Common Pleas erred in overruling the motion of the plaintiff in error (defendant below) for a new trial.

(7) For other errors of law apparent upon the record in said cause.

The plaintiff avers that in each and every of the respects hereinbefore set forth, it did, at the time duly except.

Wherefore, plaintiff in error avers that it has been aggrieved by the judgment of said Court of Common Pleas and prays that the judgment of said Court of Common Pleas may be reversed and set aside and held for naught for the errors hereinbefore specified and that the plaintiff in error may be restored to all things that it has lost, by reason of the errors hereinbefore specified and by reason of the judgment of said Court of Common Pleas.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Plaintiff in Error,*
By DOYLE, LEWIS, LEWIS & EMERY,
*Its Attorneys.*

(Waiver omitted.)

6 Court of Appeals.

*Docket and Journal Entries.*

1917.
July 3. Petition in error and entry of appearance of defendant in error, filed.
Aug. 10. Brief of plaintiff in error filed in triplicate; receipt of brief filed.
Nov. 30. Brief of defendant in error filed.
1918.
Mar. 30. Judgment of Common Pleas Court affirmed; cause remanded. Jour. 3-214.
Mar. 30. Mandate issued to Court of Common Pleas. Mand. Jour. 9.

At a term of the above named court, begun and held on the 2nd day of January, A. D. 1918, among other proceedings had by and before said court on the 30th day of March, A. D. 1918, being the 75th day of said term, as appears by its journal of that day, were the following, viz:

This 11th day of February, 1918, this cause came on for hearing upon the petition in error, the transcript and the original papers and pleadings, and the bill of exceptions from the Court of Common Pleas of Lucas County, Ohio, and was argued by counsel; on consideration whereof the court find: That the defendant in error, Wilbur H. Mohney, although riding upon a pass that was good between two stations, to-wit: Air Line Junction and Collinwood, both located in the State of Ohio, was nevertheless, at the time of his injury, travelling upon an interstate journey and was not
7 an intrastate passenger, to which finding of the court, Wilbur H. Mohney, by his counsel, then and there excepted, and

does now except. The Court further finds that the pass issued to defendant in error, Wilbur H. Mohney, was issued in consideration of Mohney's employment and acceptance of employment with The New York Central Railroad Company, plaintiff in error, to which finding and order of the court plaintiff in error excepts.

The court further finds that the injury to said defendant in error, while so riding upon said interstate journey, was the result of gross, wanton and wilful negligence on the part of the plaintiff in error, to which finding and order of the court the plaintiff in error excepts.

It is therefore considered by the court that the judgment of the Court of Common Pleas aforesaid be, and the same hereby is affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—, to which order and judgment of the court plaintiff in error excepts.

No other judgments or decrees were rendered or orders and journal entries made in said cause, as appears upon the journal of said court.

(Duly certified.)

8 Common Pleas Court.

WILBUR H. MOHNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

*Petition.*

(Filed Sept. 29, 1916.)

The plaintiff states that the defendant is now and ever since long before the acts hereinafter complained of has continued to be a railroad corporation, organized, existing and doing business under and by virtue of the laws of the State of Ohio, and as such, does now and has so continued to own and operate a line of railroad extending from the City of Toledo to the City of Cleveland and other points, on which it does now and has so continued to run trains and have in its employ many and various engineers, firemen, conductors, brakemen, flagmen, telegraph operators, and train dispatchers, and does now and has so continued to op rate the said line of railroad with its accompanying block system and other appurtenances and appliances.

Plaintiff further states that on or about March 29, 1916, he was an employee of the defendant, one of its locomotive firemen; that in the early morning of the said day he was riding as a passenger upon one of the defendant's passenger trains, on transportation issued to him by defendant carrying him as a passenger from Toledo to Cleveland, Ohio, and on a train which on said morning was running in two sections, the plaintiff being seated in the rear coach of the first section of said train out of Toledo for Cleveland.

Plaintiff further states that when the said train on which he was riding approached the town of Amherst, Ohio, the said train came to a stop at one of the block signals.

Plaintiff further states that the defendant maintained and does now maintain a block signal system along its said line, and that the said block system is so constructed that it is intended and used for the purpose of signaling engineers and trainmen as to whether or not the track ahead of them is clear and of warning them of the danger of trains which are ahead of them on the same track, and that when a train is at one given point on the said line of track, the said block system is and was so constructed and operated that at a place or places approximately a mile to the rear of the said given point, signals were and are displayed showing to engineers and other trainmen coming up from behind on the same track, that the track ahead of them is not clear and that to proceed along the said track would result in a collision.

Plaintiff further states that the defendant was grossly negligent and careless at said time in that when the train on which he was a passenger had stopped near Amherst, Ohio, the engineer of the second section of said train was grossly negligent and careless in that he did not look for, see or observe the danger signals which
10 were displayed along the line far in the rear of the train of which plaintiff was riding and which showed that the track ahead of the said second section was not clear and that to proceed along the said track would result in a collision.

Plaintiff further states that notwithstanding the fact that said danger signals were displayed the said engineer of said second section, with gross carelessness, ran his train along the said track approaching plaintiff's train, at a high speed, notwithstanding said danger signals and contrary to the known and established rules of the defendant which its said engineer and servant negligently failed to obey, and collided with the rear end of plaintiff's train, plowing through the coach in which plaintiff was riding, whereupon the said coach was broken up and knocked off the track on to another track, along which immediately thereafter another fast train of the defendant proceeded in an opposite direction and ran into the said wreck and the said car.

Plaintiff further states that the said defendant, so acting through its engineer and servant, was grossly negligent and careless in the operation of the said second section which was following the first section on which plaintiff was riding, all when the said defendant knew or in the exercise of proper care should have known that in so operating the said second section, without looking for, seeing or observing the said danger signals and in disobedience of the known and established rules of defendant, it thereby placed plaintiff
11 and other passengers in imminent danger of injury.

Plaintiff further states that at the time of said accident he was in the exercise of due care and without fault which in any way contributed to the injuries which he received at said time, and that the direct and proximate cause of the said accident and of his injuries was the gross neglect and carelessness of the defendant as is hereinbefore related.

Plaintiff further states that in said accident he sustained a fracture of the skull, so that within a short time thereafter it was necessary

for surgeons to trephine the same and to remove a portion of the bone; that he sustained a fracture of the nose and a severe shock to his nervous system, was severely wrenched and bruised over his entire body; that as a direct result of the injuries sustained at the said time, he was for some time unconscious, was removed to a hospital and there treated for some weeks; that all together on account of said injuries he has suffered impairment of the eye-sight and vision, impairment of his hearing, inability to breathe through his nose, weakness of body, nervousness, headaches, vertigo, dizziness and severe pains in his back.

Plaintiff further states that the said injuries have caused him to have ill health, to suffer loss of sleep, and do now as well as ever since the time of receiving the said injuries, cause great pain and anguish.

Plaintiff further states that on account of said injuries, he has suffered a loss of earnings and an impairment of his earning
12 capacity and ability to make a living, and that all of his injuries have been and are to his damage in the sum of $50,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $50,000.00, for his costs of court and for such other relief as is equitable and proper.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY
*His Attorneys.*

(Verification and præcipe omitted.)

Court of Common Pleas.

*Answer.*

(Filed Nov. 17, 1916.)

Now comes the above named defendant and for its answer to the petition herein, says, that it admits that the defendant is now and was, at the times mentioned in the petition herein, a railroad corporation, organized under the laws of the State of Ohio, and owning and operating a line of railroad extending among other places, from the City of Toledo, Ohio, to the City of Cleveland, Ohio; admits that on or about the 29th day of March, 1916, plaintiff was in the employ of the defendant as a locomotive fireman; admits that on said day, he was riding as a passenger upon one of the defendant's passenger trains on transportation issued to him by the defendant company, and that at said time, plaintiff was riding on a train running in two sections, and that the plaintiff was, at said time, occupying a seat
13 in the rear coach of the first section of said train; admits that when said train upon which plaintiff was riding approached the town of Amherst, Ohio, said train came to a stop; admits that defendant did, at the times mentioned in the petition herein, maintain what is known as a "block system"; defendant admits that while

said train upon which plaintiff was riding, was at a stop at or near Amherst, Ohio, the second section of said train collided with the train on which plaintiff was riding, and that as a result of said collision, plaintiff sustained injuries, the exact nature and extent of which, defendant is not advised.

Defendant denies each and every other allegation contained in said petition.

Defendant says that those in charge of the second section of said train were unable to, and did not see the so-called "block signals", for the reason that said signals were at said time, covered by a sheet of fog, so that they could not, and were not observed by the engineer in charge of said second section.

Second Defense.

For its second defense to the petition herein, defendant says that, at the time of the injuries complained of in said petition, plaintiff herein was a passenger on defendant's train, riding on a free pass, issued by defendant and good between Collinwood, Ohio and Air Line Junction, Ohio; that plaintiff was at said time on an interstate journey, from the City of Toledo, Ohio, to the City of Pittsburgh,
14 Pennsylvania; that while using said pass on said 29th day of March, 1916, plaintiff was travelling on matters wholly personal, and in no manner connected with his employment with the defendant company; that said pass on which said plaintiff was riding as a passenger, was issued to the plaintiff gratuitously under the provisions of a statute of the United States, known as the Hepburn Act of June 29th, 1906, (Federal Stat. Ann. 1909, Supp. 255); one of the conditions endorsed on said pass, and agreed to by the plaintiff herein, was the following:

"In consideration of receiving this free pass each of the persons named thereon, using the same, voluntarily assumes all risk of accidents and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agent, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a common carrier, or liable to him or her as such."

Wherefore, defendant having fully answered, prays that it may be hence dismissed with its costs.

DOYLE, LEWIS, LEWIS & EMERY,
*Attorneys for Defendant.*

(Duly vertified.)

15 Court of Common Pleas.

*Reply.*

(Filed May 5, 1917.)

Comes now Wilbur H. Mohney, plaintiff in the above entitled action and for reply to the answer of defendant heretofore filed

herein, denies each and every allegation and part of allegation in said answer contained excepting such allegations as are admissions of allegations made in plaintiff's petition.

For further reply, this plaintiff alleges that the transportation on which he was riding at the time of his injury, was issued to him by the defendant for a valuable consideration namely, his acceptance of employment and employment as one of defendant's locomotive firemen.

Wherefore plaintiff renews his prayer for judgment as in his petition contained.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
*His Attorneys.*

(Duly vertified.)

Court of Common Pleas.

*Motion.*

(Filed June 4, 1917.)

Now comes The New York Central Railroad Company, defendant herein, and moves the court for an order setting aside the
16 finding and decision of the court for a new trial herein for the following reasons:

(1) That the finding and decision of said court is not sustained by sufficient evidence.

(2) That the finding and decision of said court is not sustained by any evidence.

(3) That the finding and decision of said court is against the weight of the evidence.

(4) That the finding and decision of said court is contrary to law.

(5) That the finding and decision of said court was in favor of the plaintiff when it should have been in favor of the defendant.

(6) For other errors of law occurring at said trial to the prejudice of the defendant.

DOYLE, LEWIS, LEWIS & EMERY,
*Attorneys for Defendant.*

Common Pleas Court.

*Docket and Journal Entries.*

1916.

Sept. 29. Petition and præcipe filed; Summons for defendant issued and delivered to sheriff. Ans. Oct. 28, 1916.

Oct. 9. Summons filed, endorsed as follows, viz: Received this writ Sept. 29, 1916, and pursuant to its command I summoned on the 2nd day of October, 1916, the within named defendant, The New York Central Railroad Com-
17 pany, by delivering to F. M. Dirks, a regular ticket agent for said company, a true and certified copy of this

writ with endorsements thereon. Robert S. Gardner, Sheriff, by C. Whitaker, Deputy. $1.15.

Oct. 30. Defendant may answer by November 4, 1916. Jour. 182-189.

Nov. 17. Answer filed.

1917.

Jan. 15. Demurrer to second defense in answer filed.

Feb. 9. Above demurrer overruled; exceptions. Jour. 184-361.

May 5. Reply filed.

June 4. Motion for new trial filed.

June 9. Decree rendered, finding for plaintiff in the sum of $9,750.00. Motion for new trial overruled. Judgment as above stated and for costs. Defendant excepts; may file Bill of Exceptions within forty days. Jour. 188-375.

July 3. Bill of Exceptions of defendant filed.

July 3. Time for delivery to judge waived.

July 3. Proceedings in Error seeking to reverse Judgment in Common Pleas Court instituted in Court of Appeals. See No. 628 C. A.

July 5. Bill of Exceptions delivered to Hon. B. F. Ritchie.

July 5. Bill of Exceptions received from Hon. B. F. Ritchie.

At a term of the above named court, begun and held on the
18 11th day of September, A. D. 1915, among other proceedings had by and before said Court on the 30th day of October, A. D. 1916, being the 42nd day of said term, as appears by its Journal of that day, were the following, viz:

This day leave was granted said defendant to answer by November 4th, 1916.

On the 9th day of February, 1917, being the 29th day of the January 1917 Term, an order was made in said cause, an entry of which appears on the Journal of this Court in the words and figures as follows, to-wit:

This cause comes on this day for hearing upon the demurrer of plaintiff to the second defense of the answer of defendant and was heard upon the oral arguments of counsel and upon the written brief of the defendant only.

Whereupon the court being so advised in the premises finds that the said demurrer is not well taken and overrules the same. Thereupon the plaintiff by his counsel then and there excepted to the aforesaid ruling of the court and does now except.

On the 9th day of June, 1917, being the 59th day of the April 1917 Term, a judgment was rendered in said cause, an entry of which appears upon the Journal of this court in the words and figures as follows, to-wit:

This cause came on this 2nd day of June, 1917, for hearing upon the pleadings and the stipulations and other evidence, a jury having been waived by both parties hereto.

Whereupon the court finds, upon the issues joined, that the
19 allegations of the petition and reply of the plaintiff are sustained by the evidence and are true.

The court further specifically finds that at the time of receiving his injuries, March 29th, 1916, the plaintiff was riding as a passenger upon one of defendant's passenger trains between points all within the State of Ohio; that the transportation upon which plaintiff was riding at said time, entitling him to ride upon said train between Toledo, Ohio, and Collinwood, Ohio, was issued to plaintiff by the defendant for a valuable consideration, namely, the plaintiff's acceptance of employment and employment as one of defendant's enginemen assigned to the duties of fireman; that at said time the plaintiff was on an intrastate journey, riding on said intrastate transportation, and that the wreck occurring near Amherst, Ohio, on said date and in which plaintiff received the said injuries, was occasioned by the gross negligence of the defendant.

Whereupon the court finds in favor of the plaintiff, and assesses his damages in the sum of $9,750.00.

Thereupon the defendant, by its counsel, then and there duly excepted to each and every foregoing findings of the court against it and does now except.

Thereupon, on the 4th day of June, 1917, and within three days from the said findings and decisions of the court, the defendant duly filed in writing, its motion for a new trial in said cause, upon the several grounds stated in said motion. Thereupon, on the 8th day of June, 1917, came the parties hereto, by their attorneys, and said motion for a new trial duly came on for hearing, and was submitted to the court. Upon consideration whereof, and being fully advised, the court overruled said motion, to which ruling and order of the court, the defendant excepted.

And the court now proceeding to render judgment, in accordance with its said finding and decision, it is considered, ordered and adjudged, that the plaintiff have and recover from the defendant the sum of $9,750.00, in default of payment whereof execution shall issue therefor, to all of which findings, order and judgment, the defendant duly excepted and asked and was allowed forty days within which to prepare and file its Bill of Exceptions herein, as provided by law.

No other Judgments or Decrees were rendered, or Orders or Journal Entries made in said cause, as appears upon the Journal of said court.

(Duly certified.)

Court of Common Pleas.

*Bill of Exceptions.*

Be It Remembered, that at the trial of the above entitled action, in the Court of Common Pleas of Lucas County, Ohio, at the April, 1917, Term of said court, to-wit on the 7th day of May, 1917, thereof, before the Honorable Byron F. Ritchie, Judge of said court, a jury having been waived by both parties hereto, the following proceedings were had:

21 It is stipulated and agreed between the parties hereto as follows:

1. That the plaintiff was, on March 29th, 1916, and for some time prior thereto, in the employe of the defendant as a locomotive fireman, who had been promoted to an engineer, but had not yet been assigned to an engineer's run.

2. That New York Central employe's pass No. D O 944, good between Collinwood, Ohio, and Air Line Junction, Ohio, which is marked Exhibit 1, and is attached to this bill of exceptions and made a part hereof, was issued to the plaintiff by the defendant company.

3. That The New York Central Company was, on March 29th, 1917, and for some time prior thereto, an interstate railroad company, owning and operating a line of railroad from the City of Chicago, State of Illinois to the City of New York in the State of New York.

4. That on the early morning of March 29th, 1916, the plaintiff boarded what is known as train "First 86" at Toledo.

5. That the plaintiff presented his employe's annual pass, Exhibit 1, to the conductor of said train for transportation for Toledo to Cleveland.

6. That the passenger train upon which the plaintiff was riding on said 29th day of March, 1916, was, with the exception of the mail car thereon, a train containing cars from the City of Detroit, Michigan and the City of Toledo, Ohio, through to the City of Pittsburg, Pennsylvania.

22 That said train ran over the line of The New York Central Railroad Company to Cleveland, and over the line of The Erie Railroad Company from Cleveland to Youngstown, both in the State of Ohio, and from Youngstown to Pittsburg over the line of The Pittsburg & Lake Erie Railroad.

7. That at the request of the plaintiff, a trip pass in favor of the plaintiff and his wife was secured by the defendant company, and left with the agent of the defendant company at the station in Youngstown, Ohio, providing transportation for the plaintiff and his wife from Youngstown, Ohio, to Pittsburg, Pennsylvania, over the line of the Pittsburg & Lake Erie Railroad Company.

8. That a trip pass was, at the request of the plaintiff's wife, issued by the defendant company, providing for the transportation of the plaintiff and his wife between the City of Toledo and the City of Youngstown.

9. That while on said train between the cities of Toledo and Cleveland, the car in which the plaintiff was riding was wrecked, and as a result thereof the plaintiff sustained certain injuries.

10. The following language appears on the back of said pass D O 944, Exhibit 1 herein:

"Not good on Main Line 6, 19, 22, 25 or 26; or 21 and 43 on Toledo Division.

*Conditions.*

In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk
23 of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence

of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a coinmon carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I agree to the above conditions.

(Signed) W. H. MOHNEY.
To be signed in ink."

and it is admitted that the handwriting thereon is the signature of the plaintiff herein.

11. That the plaintiff is one of the parties designated in the so-called "Hepburn Act" of June 29th, 1906, as one to whom a pass may issue, as well as designated in the statutes of Ohio relative to the subject of the issuance of passes to railroad employes.

Exhibits One, Two, Three and Four, were offered and admitted in evidence, and are attached to this bill of exceptions, and made a part hereof.

24 The plaintiff, further to maintain the issues on his part, called as a witness WILBUR H. MOHNEY, who having been first duly sworn, on oath, testified as follows:

Direct examination.

By Mr. Miller:

Q. Your name is Wilbur H. Mohney?
A. Yes, sir.
Q. You are the plaintiff in this case?
A. Yes, sir.
Q. In the early morning of March 29th, 1916, you boarded the New York Central train at Toledo, here, first section of No. 86, did you?
A. Yes, sir.
Q. What coach did you occupy on that train?
A. The rear coach.
Q. That was what type—Pullman—or——
A. Day coach.
Q. You had transportation entitling you to ride on that train?
A. Yes, sir.
Q. Handing you Exhibit 1, will you please tell us when you boarded that train, or shortly thereafter, what if anything was done with that card? What if anything did you do with it? Show it to anybody, or anything of that kind?
A. Showed it to the conductor when he came through the train.

Q. And that is the card, Exhibit 1,—the pass, or whatever you call it,—on which you were riding on that train?

A. Yes, sir.

25 Q. On that morning you were going to the City of Cleveland, were you?

A. Yes.

Q. And were you going beyond the City of Cleveland?

A. Yes, sir.

Q. From the City of Cleveland, what other city were you bound for?

A. Pittsburgh.

Q. What was you route?

A. By the way of Youngstown over the Erie from Cleveland, and the P. & L. E. from there to Pittsburgh.

Q. Leaving Cleveland, what city were you bound for?

A. Youngstown.

Q. How were you to get to Youngstown?

A. On that train, over the Erie.

Q. Over the Erie Railroad? What particular car do you mean you were going from Toledo to Youngstown in?

A. My understanding was, that car was going on through.

Q. Where?

A. To Youngstown.

Q. What if any transportation did you carry, or were you to get, from Cleveland to Youngstown?

A. I didn't have any, only by the way of Ashtabula.

Q. I am talking about from Cleveland to Youngstown. How had you intended getting from Cleveland to Youngstown?

A. Paying my fare.

Q. Paying you fare on that train?

A. On that train.

Q. What was your errand, if any, in the City of Youngstown?

A. Well, when I got to Youngstown I intended to call up my brother in law there, and see if they had made any arrange-

26 ments about my mother's funeral, which I was going to at the time.

Q. Had you had any notice as to where the funeral was to be held, at that time?

A. Not a particle; I didn't know where it was going to be at that time.

Q. Who was your brother in law?

A. His name is Weadock.

Q. Where did he live?

A. Eight or nine miles south of Pittsburgh; Option is the post-office, but I can't remember the name of the town.

Q. He is the B. & O. agent at that station?

A. He is B. & O. agent at that station, but I can't remember the name of the station.

Q. Where did your mother die?

A. At that place.

Q. Where might she have been buried?

A. Our old burying ground is up in Pennsylvania, where all the rest of them are buried.
Q. How far from that place?
A. About a hundered and fifty miles north of Pittsburgh.
Q. Then there was also a grave yard near Option?
A. Near Option, where they did finally bury her.
Q. Going back, then, what was your intention, or what plan had you made, at Youngstown?
A. Well, to call him up there, and I had arrangements made there for a pass——

The Court: Where did this injury occur; between Cleveland and Youngstown?
Mr. Miller: Between Toledo and Cleveland; Amherst.

27 Q. What else were you to do at Youngstown?
A. That train out of Pittsburgh. I found I could not make connection—it didn't leave there right—there are only two trains a day, a little jerk water road and only two trains a day stop at that place, about four o'clock; I found that out before I got there; so I imagined the way I would work it, I would loaf around there, if I got the pass, and visit with some of the follows. I used to work in there on the Pea Vine, and I would rather hang around there where I knew some of them than hang around Pittsburgh three or four hours.
Q. And you would call up your brother in law from there?
A. Call up my brother in law; that was my intentions.
Q. What fellows do you know at Youngstown?
A. All those fellows that used to work on that branch that I used to work on, that I used to work with.
Q. Did you get to Youngstown?
A. Not quite.
Q. Did you get to Cleveland?
A. Not yet.
Q. Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning?
A. You will have to ask somebody that knows; I was asleep.
Q. Where did you wake up?
A. In the hospital.
Q. You found that was the Elyria Hospital, was it?
A. Yes.
Q. This Exhibit 1 on which you rode to the point of the wreck, Amherst, had been turned over to you by whom? By what company?
A. The New York Central.
Q. When?
A. About the first of the year.
28 Q. The first of the year 1916? At that time what was your employment?
A. I was fireman.
Q. With the rank of what?
The Court: What time was this turned over to you?
A. About the first of the year, I should judge.
Mr. Miller: January 1st, 1916?

A. Yes, sir.

Q. At that time you were fireman with the rank of engineer, and hadn't yet been assigned to a run; that is true?

A. Yes, sir.

Q. And where did you run as fireman, what line?

A. Between Air Line Junction and Collinwood.

Q. At the time of this wreck in March, was that your run?

A. Yes, sir.

Q. And had been for how long a period?

A. I had been in the employ of the company about six years and three months.

Q. Was this the first card of this kind, Exhibit 1,—the first one you had ever gotten from the defendant?

A. No.

Q. You had had other ones before that?

A. Yes, sir.

Q. How often did you get them?

A. Well, at first, they were issued quarterly, and then extended to six months, and then I think they finally extended them to annual.

Q. What if any conversation or dealings did you have with any one, at the time your first card was issued to you?

29 A. I just asked the engine dispatcher for the pass.

Q. What if anything was said?

A. He said I could not have any until I had been in the employ a certain length of time, of the company.

Q. He didn't say "a certain length of time." Give us the conversation; what you asked, and what he said in reply.

A. Well, you had to be an employee of the company about six months before you could have a pass issued to you.

Q. What did you ask him?

A. Asked him for a rate book and a pass.

Q. What is a rate book?

A. That is the scale of wages you are working on.

Q. That a fireman gets?

A. That a fireman gets.

Q. When you asked him for the rate book, and your pass, what did he say?

A. He said I could not have it until I had been in the employ of the company a certain length of time, six months; I think that was the length of time then.

Q. What if anything did he say about your getting a pass at the end of that time, or anybody having a pass?

A. He said they didn't get them—didn't issue them—until they had.

Q. Did he tell you when you would get one, or anybody would get one?

A. At the end of six months, a fireman. I think they give them to them now at the end of thirty days.

Q. Then did you get a pass at the end of six months?

A. Yes, sir.

30 Q. And have you had a pass ever since?

A. Yes, sir.

Q. This card, Exhibit 1, is the last card you have ever had?
A. Yes, sir.
Q. I understand there had been issued by the company a pass entitling you to ride from Toledo to Youngstown, by the way of Cleveland and Ashtabula?
A. Yes, sir.
Q. Did you ride on that pass?
A. No, sir.
Q. Did you ever ride on any pass issued, which entitled you to transportation from Youngstown to Pittsburgh?
A. Previous to this time?
Q. No; any pass that was issued to you at that time.
A. No, sir; I never saw it, even.
Q. What if anything was ever said to you by any roadmaster or locomotive master—whatever you call it—about issuing passes to employes?
A. None that I ever know; the engine dispatcher generally handed me the pass.
Q. What did the engine dispatcher have to say to you about the pass?
A. Well, when my time was up—my six months—I got my pass, when it was issued.
Q. Did he ever say anything to you about issuing a pass to the employes?
A. He said they all received them when they had been in the service for six months.

Cross-examination.

By Mr. Lewis:

Q. When was your mother's funeral to be, Mr. Mohney?
A. I don't know a thing about it, any more than you do.
31 Q. You were on your way to attend her funeral?
A. Yes, sir.
Q. Did you know when the funeral was to occur?
A. No, sir; I didn't even know the day she died.
Q. You knew that she was dead?
A. Yes.
Q. But not when the funeral would be?
A. No.
Q. I thought you told us a minute ago it was to be on the 30th?
A. I didn't tell you exactly. I said I imagined it would be on the 30th.
Q. You imagined it would be on the 30th?
A. I supposed they kept them about two days.
Q. She died at the home of your brother in law at Option?
A. That is the post Office.
Q. How far is that?
A. About nine miles.
Q. In the state of Pennsylvania?
A. Yes, sir.

Q. You had received, at the ticket office here, a trip pass for yourself and wife from Toledo, by way of Ashtabula and Youngstown?

A. Yes, sir.

Q. Then I understand there was left, at your request, a pass on the P. & L. E. for yourself and wife, with the ticket agent at Youngstown?

A. Yes, sir.

Q. So, when you boarded the train here at Toledo, you were going as directly as you could, from Toledo to Pittsburgh, Pennsylvania?

A. Not necessarily. Directly, as close as I could, in one way, but I could not make the connections in Youngstown on that train.

Q. But the train upon which you were riding went straight through from Toledo to Pittsburgh?

A. Yes, it went straight through.

32 Q. So you could have gone through, on that train?

A. I could have, if I paid my way.

Q. You would have to pay your way from Cleveland to Youngstown?

A. To Pittsburgh, I would have to pay my way.

Q. You had to get off to get your pass?

A. I had to get off to get my pass, and walk about a mile from the New York Central to the P. & L. E. Depot.

The Court: In Cleveland?

A. In Youngstown. It may not be a mile, but it is over half a milt. It is quite a distance.

Mr. Lewis: That trip you were travelling on was entirely personal, and had no connection with your employment with the railroad company?

A. No.

The foregoing, together with the Exhibits hereto attached and made a part hereof, is all of the evidence offered and given by both parties at the trial of the above entitled cause, and is all of the evidence in this case.

And the Court, being duly advised in the premises, did, on the 2nd day of June, 1917, find in favor of the plaintiff, and assessed the amount of plaintiff's damages in the sum of $9,750.00.

And thereupon and within three days thereafter, to-wit, on the 4th day of June, 1917, the defendant, by its counsel, filed its motion in writing for a new trial of said cause on behalf of said defendant, and to set aside the verdict, as shown by the record; and the court, after due consideration of said motion did, on the 9th day of June,

33 1917, overrule said motion for a new trial and gave judgment for said plaintiff, as shown by the record, to which overruling of said defendant's motion and the giving of said judgment, defendant's counsel then and there excepted, and upon request of defendant's counsel, defendant was given forty days in which to prepare and file its bill of exceptions in said cause.

And now, on this 3rd day of July, 1917, came said defendant, by its counsel, and filed in said cause its bill of exceptions.

And the court finding that said bill of exceptions was, on the 3rd

day of July, 1917, filed by said defendant with the clerk of said court, and within the time required by law, and that forthwith, on the — day of July, 1917, notice to counsel being waived, and the same being transmitted and submitted to the trial judge on the 5th day of July, 1917, and within the time required by law for settling, allowing and signing, and the judge finding the bill of exceptions to be a true and correct bill of exceptions, and that the said bill of exceptions, together with the Exhibits thereto attached and made a part thereof, contains all of the evidence offered and given in the trial of said cause, does accordingly, on the 5th day of July, 1917, and within the time required by law, allow and sign the same, and orders that said bill of exceptions be made a part of the record in the above entitled cause, but be not spread upon the journal.

BYRON T. RITCHIE,
*Judge of the Court of Common Pleas of Lucas County, Ohio, and Trial Judge.*

34 EXHIBIT NO. 1.

New York Central Railroad Company,

West of Buffalo.

1916. DO 944.

Pass W. H. Mohney,
Account Engineer,
Between Collinwood—Air Line Jct.,
Toledo Division,
Until December 31, 1916. Unless otherwise ordered and subject to conditions on back. Valid when countersigned by W. F. Schaff or J. H. Turner.

D. C. MOON,
*General Manager.*

Countersigned
J. H. TURNER.

On Back: Not good on Main Line 6, 19, 22, 25 or 26; or 21 and 43 on Toledo Division.

*Conditions.*

In consideration of receiving this free pass, each of the persons named thereon, using the same voluntarily assumes all risk of accidents, and expressly agrees that the Coumpany shall not be liable under any circumstances, whether of negligence of itself, its agents or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a Common Carrier, or liable to him or her as such.

35 And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass

states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.

If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I Agree to the Above Conditions

(Signed) W. H. MOHNEY.

To be signed in ink.

EXHIBIT No. 2.

Common Pleas Court.

*Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto, Wilbur H. Mohney, plaintiff, and The New York Central Railroad Company, defendant, that D. C. Moon, if called as a witness in this cause, would testify as follows:

1. That on March 29, 1916, and for sometime prior thereto, he was general manager of The New York Central Railroad Company, defendant herein, with headquarters and offices at the City of Cleveland, Ohio, and had general supervision and control over all lines of the defendant's railroad, extending between the cities of Cleveland, Ohio, and Toledo, Ohio, and that he, the said D. C. Moon, continued in said capacity for many months after said March 29, 1916.

36 2. That the wreck occurring on the defendant's line near Amherst, Ohio, on or about March 29, 1916, in which the plaintiff received some injuries, was due to the fact that the engineman of the second section of defendant's train No. 86 disregarded the caution signal about 8,000 feet and the stop signal about 3,000 feet in the rear of the first section of defendant's train No. 86.

It is further stipulated that the foregoing statements of the said D. C. Moon, general manager of the defendant company as aforesaid, are hereby agreed upon in lieu of the plaintiff's taking the deposition of the said D. C. Moon, and that the said statements shall be admissible in evidence on the trial of this cause, on introduction by either party hereto, subject only to objections based upon the materiality or relevancy of said statements to the issues in this action.

In Witness Whereof the parties hereto have hereunto set their hands by their attorneys, duly authorized, at Toledo, Ohio, on this 9th day of April, A. D. 1917.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
*His Attorneys.*

THE NEW YORK CENTRAL RAILROAD COMPANY,
Per DOYLE, LEWIS, LEWIS & EMERY,
*Its Attorneys.*

37 EXHIBIT No. 3.

Common Pleas Court.

*Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto, on this 7th day of May, A. D. 1917, that the damages sustained by Wilbur H. Mohney, plaintiff herein, for personal injuries suffered by him on the early morning of March 29, 1916, in the wreck on The New York Central Railroad, near Amherst, Ohio, as set forth in his petition filed herein, are Ninety Seven Hundred and Fifty Dollars.

In Testimony Whereof the parties hereto have hereunto set their hands by their attorneys duly authorized.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
*His Attorneys.*
THE NEW YORK CENTRAL RAILROAD COMPANY,
Per DOYLE, LEWIS, LEWIS & EMERY,
*Its Attorneys.*

EXHIBIT No. 4.

Common Pleas Court.

*Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto, on this 7th day of May, A. D. 1917, that on March 29, 1916, at the time when the first section of defendant's train No. 85
38 out of Toledo, was being followed at some distance, on the same track, by the second section of defendant's train No. 86, the following rules of the company were in force and effect:

302. Normal Indication of Signals. The normal indication of interlocking signals is "Stop," except the distant, which is "Caution—Be Prepared to Stop at the Home Signal."

304. Indications are given by not more than two positions of an arm, and in addition by night lights of prescribed color.

305. The arms of home and dwarf signals have a square end, and are painted red with a white band near the end.

306. Home Signal. The arm of the home signal in the horizontal position by day, and in addition, a red light by night, indicates "Stop."

309. Distant Signal. The arm of the distant signal has a forked end and is painted yellow with a black <—shaped band near the end.

310. The arm of the distant signal in the horizontal position by day, and in addition, a green light by night, indicates "Caution—Be Prepared to Stop at the Home Signal."

312. The arm of the dwarf signal in the horizontal position by day, and in addition, a purple light by night, indicates "Stop."

325. Trains or engines must be run to, but not beyond, a signal indicating "Stop."

39 327. The clearing of any signal permits only one train or engine to pass that signal. If more than one train or engine is waiting for any signal to be cleared, any following train or engine must not proceed until the signal has been cleared after having been put to the "Stop" position behind the next preceding.

Home Signal.—A fixed signal at the point at which trains are required to stop when the route is not clear.

Dwarf Signal.—A low, fixed signal of semaphore type.

In Testimony Whereof the parties hereto have on this day hereunto set their hands by their attorneys duly authorized.

WILBUR H. MOHNEY,
Per MILLER, MILLER, BRADY & SEELEY,
*His Attorneys.*

THE NEW YORK CENTRAL RAILROAD COMPANY,
Per DOYLE, LEWIS, LEWIS & EMERY,
*Its Attorneys.*

40 STATE OF OHIO,
*Lucas County, ss:*

I, William F. Renz, Clerk of the Court of Common Pleas of Lucas County, Ohio, and ex-officio Clerk of the Court of Appeals for Lucas County, Ohio, do hereby certify the foregoing to be a true and correct copy of the transcript of record and all proceedings in the said cause in the court of Appeals of Lucas County, Ohio.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Toledo, Ohio, in said County this 20th day of August, A. D. 1918.

[Seal Common Pleas Court, Lucas County, Ohio.]

WILLIAM F. RENZ, *Clerk,*
By J. KERINS, *Deputy Clerk.*

41 Certified Copy.

In the Supreme Court of Ohio.

15925.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

*vs.*

WILBUR H. MOHNEY, Defendant in Error.

*Motion and Brief in Support of Motion for Order Requiring Court of Appeals to Certify Record.*

Doyle & Lewis, Attorneys for Plaintiff in Error.

Filed Apr. 1, 1918. Supreme Court of Ohio. Frank E. McKean, Clerk.

41*a* In the Supreme Court of Ohio.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

*vs.*

WILBUR H. MOHNEY, Defendant in Error.

*Motion for Order to Certify Record.*

Now comes The New York Central Railroad Company, and moves this Honorable Court for an order directing the Court of Appeals of Lucas County, Ohio, to certify to this court, its record in the above entitled case #628 on the docket of said Court of Appeals, wherein The New York Central Railroad Company was plaintiff in error, and Wilbur H. Mohney was defendant in error, on the following grounds shown in said record, to-wit:

(*a*) The case is of public interest.

(*b*) The case is of great general interest.

(*c*) Error has intervened to the prejudice of plaintiff in error.

(*d*) The case involves a determination of the question whether the Federal or State decisions are controlling where a person, at the time of his injury is engaged in an interstate journey but at the time travelling upon a free pass good only between points within the State.

42 This action was originally brought in the Court of Common Pleas of Lucas County, Ohio, on the 29th day of September, 1916, by Wilbur H. Mohney to recover for personal injuries sustained by him on or about the 29th day of March, 1916, at Amherst, in the State of Ohio, while the said Mohney was riding as a passenger on one of the New York Central trains, using for such purpose an Annual Pass that had been issued to him by the Railroad Company,

entitling him to ride over the company's line of railroad between the stations of Air Line Junction, near Toledo, and Collinwood, near Cleveland, both in the State of Ohio. The said Mohney was an engineer in the employ of the said Railroad Company, but at the time of his injury, was on his way from Toledo to a point near Pittsburgh, in the State of Pennsylvania, for the purpose of attending his mother's funeral, and was not at said time, travelling in furtherance of the performance of any duty which he owed to the Railroad Company.

The Court of Common Pleas found that the plaintiff was on an interstate journey; that the transportation upon which the plaintiff was riding at the time of his injury, was issued to the plaintiff below by the Railroad Company in consideration of Mohney's acceptance of employment with said Railway Company; that the wreck occurring near Amherst, Ohio, in connection with which Mohney was injured, was occasioned by the gross negligence of the Railroad Company.

The Court of Appeals of Lucas County, Ohio, affirmed the judgment of the Court of Common Pleas, finding that the said Mohney was, at the time of his injuries, travelling upon an interstate journey; that the pass upon which he was riding at said time was issued in consideration of Mohney's employment with the said Rail-
43 road Company, and that the injury sustained by Mohney was the result of gross wanton and willful negligence on the part of said Railway Company.

On this state of facts, the questions of public interest and great general interest involved, are as follows: Do the conditions endorsed upon a pass, and accepted in writing by the person using the pass, bind the plaintiff and relieve the company from liability for injuries when such pass provides that it is free, and that the person so using it voluntarily assumes all risks of accidents and agrees that the company shall not be liable under any circumstances for any injury sustained by such persons while using such pass?

The error intervening to the prejudice of the plaintiff in error is as follows: Both the Court of Common Pleas and the Court of Appeals found that the defendant was guilty of gross negligence, the Court of Appeals finding that the conduct of the defendant was willful and wanton. These findings were made when the petition upon which the cause of action was based, alleged only that the defendant was guilty of gross negligence and carelessness. No claim was made by plaintiff that the element of willfulness or wantonness entered into the conduct of defendant.

The Federal question involved, is as follows: Under the evidence in this cause, the defendant in error, Mohney, was on his way from Toledo, Ohio, to a point near Pittsburgh, in the State of Pennsylvania, and that while riding on one of defendant's trains on a pass good between Toledo and Cleveland, both in the State of Ohio, he sustained injuries. Decisions of the Supreme Court of the United States hold that a person on an intrastate journey, travelling upon a free pass is bound by the terms endorsed upon the pass, relieving the

44 carrier from liability for injury whether due to negligence of the carrier or otherwise.

Plaintiff in error says that the decision of the Court of Appeals of Lucas County, in this cause, is contrary to the law as set forth by the Supreme Court of the United States in the case of Charleston & Western Carolina Railway Company vs. Thompson, 234 U. S., 576.

Wherefore, plaintiff in error prays this court to make an order directing the Court of Appeals of Lucas County, Ohio, to certify its record herein to this court.

DOYLE & LEWIS,
*Attorneys for Plaintiff in Error.*

45 In the Supreme Court of Ohio.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

*vs.*

WILBUR H. MOHNEY, Defendant in Error.

*Brief in Support of Motion for an Order Requiring the Court of Appeals of Lucas County to Certify its Record.*

Three important questions are presented in this case:

1. Is an employee riding on personal business, using a pass and on an interstate journey, bound by the conditions endorsed on the pass and accepted by such passenger?

2. Can a judgment be based solely upon willful and wanton conduct of the defendant, when willfulness and wantonness is not pleaded or urged by the plaintiff, under circumstances where a showing of negligence only would not render the defendant liable.

3. Where a passenger was on an interstate journey, and at the time of his injury was riding upon an intrastate pass issued in accordance with both the Federal and State laws, does not
46 the fact that the journey was interstate, make the question of liability dependent on and governed by the Federal decisions?

The facts in the case at bar are:

Wilbur H. Mohney brought suit against The New York Central Railroad Company in the Court of Common Pleas of Luas County, Ohio, for injuries which he sustained while riding on one of the defendant's trains, involved in a wreck at Amherst, Ohio, on March 29th, 1916.

At the time of the injuries sustained by the plaintiff, he was an employee of the Railroad Company, but was not at the time of the accident, engaged in any work for the company, but was traveling on a pass on his way to Pittsburgh, Pennsylvania, for the purpose of attending his mother's funeral.

The case was submitted to the court, a jury having been waived, upon stipulations and the testimony of Mohney.

The plaintiff in error claims that Mohney was, at the time of his injury, on an interstate journey from Toledo to Pittsburgh, riding on a free pass, and that under the decisions of the United States Supreme

Court, the conditions agreed to and endorsed upon the back of the pass are binding. The Common Pleas Court found that these conditions were not binding, and that the defendant Railroad Company was liable for the injuries so sustained by Mohney, and this judgment was affirmed by the Court of Appeals.

Mohney, on the early morning of March 29th, 1916, boarded the defendant's train known as "First 86", at Toledo, for the purpose of going to Pittsburgh, or near Pittsburgh, to attend his mother's funeral,
and was travelling on his employee's pass, good between
47 Collinwood and Air Line Junction. At Mohney's request, transportation had been secured through the Railroad Company, over the Pittsburgh & Lake Erie Railroad, from Youngstown, Ohio, to Pittsburgh, Pennsylvania, which pass was, at Mohney's request, left at the agent's office in Youngstown. Transportation for Toledo to Youngstown had been delivered to the plaintiff, in favor of himself and his wife. Mrs. Mohney decided not to accompany Mohney on this journey and accordingly Mohney used his annual pass between Toledo and Collinwood, and expected, according to his evidence, to pay his fare from Cleveland to Youngstown, rather than ride on his transportation over the New York Central Lines by way of Ashtabula. This plan would save him some few hours' time.

The train upon which Mohney was riding, ran through from Toledo to Pittsburgh, over the New York Central to Cleveland, over the Erie to Youngstown, and over the P. & L. E. from Youngstown to Pittsburgh. It was Mohney's intention to stay on the same train until he got to Youngstown, and there get his transportation left at the agent's office, which would carry him from that point to Pittsburgh.

Mohney testified that when he reached Youngstown, he intended to get off of the train, call up his brother-in-law in Pennsylvania, get the facts about his mother's funeral, apparently not going through to Pittsburgh on this same train that he boarded at Toledo, but to wait at Youngstown, in order to catch a train that would stop at the station where his mother lived, near Pittsburgh.

In that connection, he testified on page 9 of the bill of exceptions, as follows:

"Q. When was your mother's funeral to be, Mr. Mohney?

A. I don't know a thing about it, any more than you do.

48 Q. You were on your way to attend her funeral?

A. Yes, sir.

Q. I though- you told us a minute ago it was to be on the 30th?

—. ——.

Q. So when you boarded the train here at Toledo, you were going as directly as you could from Toledo to Pittsburgh, Pa?

A. Not necessarily—directly as close as I could in one way, but I could not make the connections in Youngstown on that train."

And again on page 5, the plaintiff testifies:

Q. Where did your mother die?

A. At that place. (Meaning Option, Pa.)

Q. Where might she have been buried?

A. Our old burying-ground is up in Pennsylvania, where all the rest of them are buried.

Q. How far from that place?
A. About 150 miles north of Pittsburgh.
Q. Then there was also a graveyard near Option?
A. Near Option, where they did finally bury her.
Q. What else were you to do at Youngstown?
A. That train out of Pittsburgh, I found I could not make connections—it didn't leave there right—there are only two trains a day, a little jerk-water road and only two trains a day stop at that place, about four o'clock. I found that out before I got there; so I imagined the way I would work it, I would loaf around there, if I got the pass, visit with some of the fellows. I used to work in there on the Pea Vine, and I would rather hang around there where I knew some of them, than hang around Pittsburgh three or four hours."

The agreed statement of facts and the testimony of the plaintiff makes this clear:

(1) That the plaintiff was on his way from Toledo, Ohio, to Pittsburgh, Pennsylvania, for the purpose of attending his mother's funeral.

(2) That while on the train of the defendant company between Toledo and Cleveland, he was injured, at which time he was riding on free transportation.

49 As indicated on its face, this pass is good between Air Line Junction and Collinwood, both places within the limits of the State of Ohio.

Section 8595 of the United States Compiled Statutes, (The Hepburn Act), among other things, provides as follows:

"Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;"

Mohney was accordingly entitled to transportation.

Section 5 of the Interstate Commerce Act, as amended June 29th, 1906, in Section 8563 of the United States Compiled Statutes, provides:

"No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law;" etc.

The question in this case is, was the plaintiff while on his way to Pittsburgh, and while riding on free transportation between Toledo and Cleveland, which transportation was intrastate, actually on an interstate journey?

1. As to the first question, was Mohney's pass a free pass or was it issued as a part consideration for employment?

Section 5 of the Interstate Commerce Act as amended June 29, 1906 (Section 8563, United States Compiled Statutes) provides among other things, as follows:

50 "No common carrier subject to the provisions of this Act, shall after January 1, 1907, directly or indirectly issue or give any interstate free tickets, free pass or free transportation for passengers, except to its employees and their families, its officers, agents, physicians, surgeons, attorneys at law", etc.

Section 516 of the Ohio General Code, provides among other things, as follows:

"No railroad company, owning or operating a railroad wholly or partly within this state, shall directly or indirectly, issue or give a free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians and attorneys at law."

The Federal Act (Sec. 8595) is similar to and practically identical with the Ohio Act, and is later referred to.

The pass which Mohney was using at the time of his injury had the following conditions endorsed on the back and accepted by Mohney in writing:

Conditions.

"In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agent, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property, and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, or liable to him or her as such.

And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.

51 If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.

I agree to the above conditions.

(Signed) W. H. MOHNEY.

The train upon which Mohney was riding was known as the First Section of No. 86. The first section was running a short distance ahead of the second section and when near Amherst, Ohio, the engineer on the second section ran by certain block signals and collided with the rear of the first section, causing injuries for which Mohney brought suit.

In a decision of the United States Supreme Court, rendered June 22nd, 1914, in the case of Railway Company vs. Thompson, 234 U. S., 576, it is held that under the free pass provision of the Hepburn Act, a free pass issued by a railroad company between interstate points to a member of the family of an employee is gratuitous and not in consideration of services of the employee, and that the stipulations appearing on the pass, including one exempting the company from liability in case of injury, are valid.

In this case the plaintiff, Lizzie Thompson, sued the railroad company to recover for injuries sustained while she was a passenger upon a train from South Carolina to Georgia. The company pleaded that she was traveling on a free pass, that exempted it from liability. The defense was unsuccessful. The Court of Appeals held that such a stipulation was binding on a free pass, but held that the Hepburn Act created an exception, and that a so-called free pass under that act, issued to a member of an employee's family, really was not a free pass, but was issued upon consideration of the services of the employee. The Railroad Company assigned the construction of the Court of Appeals on the pass conditions as error, and Mr.
52 Justice Holmes, in delivering the opinion of the court, says, on page 577:

"The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Section 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to all. If follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. Northern Pacific Ry. Co. vs. Adams, 192 U. S., 440. Boering vs. Chesapeake Beach Ry. Co., 193 U. S., 442."

The Supreme Court in this case, bases its opinion upon the theory that the pass was free and gratuitous, and that in no sense of the word could one riding on such a pass be deemed a passenger for hire. As far as the case at bar is concerned, this decision in the Thompson case must forever settle the question as to whether
53 the plaintiff was riding on a free and gratuitous pass, or whether he was a passenger for hire; that is, whether the pass was given to him as part consideration for his employment.

The record in this case shows by the admission of the plaintiff himself, that he was not on company business; that the trip which he was then on, was wholly personal to himself, and in fact, the reason for the trip is given as proof of this statement, namely, that he was on his way to Pittsburgh to attend his mother's funeral.

From the plain facts here in this record, the plaintiff was on an interstate journey. He was on business wholly personal to himself, was riding on a pass that exempted the company from liability, and consequently his rights are determined by the Federal decisions. We submit that under these conditions, the plaintiff is not entitled to recover in this action, and that the ruling made by this court on the demurrer to the second defense set up in the answer, should be followed.

In a recent decision of the Supreme Court of Indiana, handed down March 28th, 1917, in the case of Ft. Wayne & Wabash Valley Traction Co. vs. Justus, 115 N. E., 585, the Supreme Court of Indiana held that a pass issued by the defendant to the deceased, an officer of another railroad in exchange for passes issued by his road to officers of defendant, as authorized by the State statutes, is a free pass or a gratuity, so that a provision therein that he should assume risk of accident is binding, preventing recovery for his death while riding thereon.

After quoting from the opinion of Justice Holmes in the Thompson case, the court then says:

"It is practically conceded by the parties to this appeal that if the pass in question was a 'free pass', or as the expression is frequently used, 'a gratuity', then the stipulation as to releasing the
54 company from liability in case of injury is valid and binding upon the parties and their representatives. It has been so held by this court and the courts of other states and of the United States. Payne vs. R. R. Co., 157 Ind., 616; N. P. R. R. vs. Adams, 192 U. S. 440."

In the case of Northern Pacific R. R. Co. vs. Adams, 192 U. S., 440, suit was brought for the purpose of recovering for the death of John H. Adams, who was on his way from Hope, Idaho, to Spokane. Adams, who was a lawyer and the attorney for several railway companies, though not in the employ of the Northern Pacific, was riding on a free pass, the conditions on which pass, provided that the company was not to be liable under any circumstances for injury to the person, or for loss or damage to the property of the passenger using said pass. Action was brought by the plaintiff, the widow and son of the deceased, in the Circuit Court of the United States, for the District of Washington. A verdict and judgment in favor of the plaintiff was sustained by the Court of Appeals, the case was taken into the United States Supreme Court on a writ of certiorari. The Supreme Court reversed the lower court and set aside the verdict, and in the court's opinion, Mr. Justice Brewer says, on page 453:

"The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted

that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby.

It follows from these considerations that there was error in the proceedings of the Circuit Court and Court of Appeals. The judgments of those courts will be reversed and the case remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial."

There are numerous other decisions of the United States Courts to the same effect, but the last decision, namely, that of the Thompson case, so clearly fixes the rule that should be applied in the case at bar, that we submit that this decision in the Thompson case is controlling.

The opinion in the case of Railway against Thompson, 234 U. S., 576, would seem to conclusively establish that the pass in this case was what purports to be, free and gratuitous and not issued for a consideration.

2. The Court of Appeals bases its judgment largely if not entirely, upon their finding that the Railroad Company was guilty of wilfulness and wantonness.

Can wilfulness and wantonness be the basis of liability when not pleaded or even urged in the trial court?

The plaintiff below in his petition, alleges that:

"The engineer of the second section of said train was grossly negligent and careless in that he did not look for, see or observe the danger signals which were displayed along the line far in the rear of the train on which plaintiff was riding, and which showed that the track ahead of said second section was not clear and that to proceed along the said track would result in a collision."

No claim is made that the engineer actually saw the block signals and knowing that they were set against him, deliberately ran by them. As set forth in the petition, plaintiff below predicates liability upon the failure of the engineer "to look for, see or observe" the block signals. Under all the authorities, we submit that in order to find wilfulness or wantonness there must be some evidence either of intent or a conscious knowledge that injury would likely result from his conduct. An inadvertent failure to use due care indicates merely negligence.

White's Personal Injuries on Railroads, Section 14, reads:

"Slight negligence not being incompatible with the exercise of mere ordinary care, neither would the absence of ordinary care show willfulness, wantonness or recklessness, but to establish the absence of such care as would show willfulness or wantonness, it would seem to require more than a mere absence of ordinary care. To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom, for without this conciousness the omission

would be absence of care alone. Hence, it is, that a mere inadvertent failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes wilfulness."

Shearman & Redfield, Vol. 1, Sec. 114A, 6th Ed., reads:

"It is universally conceded that where the defendant's conduct that occasioned the injury was willful or wanton the doctrine of contributory negligence as a defense has no application. In the language of another 'when contributory negligence is relied on as a defence to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly, or intentionally, such defense is vitiated and overcome'. The words wanton and reckless have been thought somewhat indefinite when
57 applied to this class of cases generally; but when applied to the case of injury to one whose peril was discovered by the defendant in time, with the means at hand, to avert the injury as a consequence of his own prior negligence, these terms have been universally approved.

That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to will intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from. A question has sometimes been made whether the willfulness referred to relates to the act or the intention to injure; the better conclusion is that it may be either."

That it is not only necessary to plead willfulness and wantonness, but also to plead the facts indicating such willfulness or wantonness, is set forth in Railroad vs. Mitchell, 134 Alabama, 261, where the court says on page 267:

"From this review of the count, it appears that it falls short of averring wantonness or willfulness in inflicting the injury complained of; that it charges no more than that the engineer wantonly or intentionally ran said engine through said town or village of Elmore, without proper or sufficient warning or notice of the approach of said engine, and is, therefore, no more than a count for mere negligence."

Also in Railroad vs. Thrift, 140 Ill. App., 414, the court says on page 417:

"The violation of the ordinance which is the sole negligence charged, did not constitute wantonness. It is not sufficiently pleaded that appellee had knowledge, express or implied, of the presence or probable presence of appellant upon the right of way. It therefore cannot be said that under the circumstances detailed in the
58 declaration, such want of care and disregard for the rights of appellant existed as to constitute willfulness or wantonness."

Also in Sington vs. Railway, 76 So., 48, the court says in the syllabus:

"The solution of the question whether a count charges wanton or willful misconduct, or simple negligence, cannot be aided by the use of the terms 'willfully' and 'wantonly', but is measurable by the facts set forth."

See also Griffin vs. Railway, 21 O. C. C., 552 and 553.

3. The portion of Mohney's evidence above quoted, indicates beyond any doubt, that he left Toledo for Pittsburgh, or a point near Pittsburgh, for the purpose of attending his mother's funeral. He was, therefore, on an interstate journey.

The decisions of the Federal Court determine the question of liability, and the construction made by such courts, in reference to the validity of the conditions endorsed on a pass, is binding upon the State Courts.

That Mohney, as shown by the evidence, was on an interstate journey, is established by these decisions.

If the plaintiff was travelling from one state to another, notwithstanding the fact that the transportation upon which he was riding at the time of his injury was intrastate, he was, according to the authorities, on an interstate journey, and thus coming under the Federal decisions.

According to the decisions by our United States Supreme Court, it is the intent that governs and not necessarily the character of transportation that at the time was being used.

In the case of the Railroad Commission of Ohio vs. Worthington, Receiver of The Wheeling & Lake Erie Railroad Company,
59 225 U. S., 101, the United States Supreme Court held, that coal shipped from the mines in Ohio and billed to Huron, Ohio, but intended for lake shipment, is an interstate shipment, and not a state shipment, notwithstanding the fact that the billing is from a point within the state to another point within the same state, and that a rate fixed by the Ohio Railroad Commission for coal from state points to state points, but intended for lake shipment, is a rate affecting interstate shipments under the commerce clause of the Constitution, as an attempt to regulate interstate commerce.

The syllabus reads:

"A rate fixed on that part of interstate carriage which includes the actual placing of the shipment into vessels ready to be carried beyond the State destination is, as to merchandise intended for points beyond the State, a burden in interstate commerce and beyond the power of the State to impose even if the merchandise is billed from a point within the State to the point where the vessel is."

Distinguishing Gulf, Colordo & Santa Fe Railway Co. vs. Texas, 204 U. S., 403.

"Through billing to the point beyond the State is not always necessary to determine that a shipment is interstate." Citing Southern Pacific Terminal Co. vs. Young, 219 U. S., 498.

"A rate fixed by the Ohio Railroad Commission for coal from state points to 'on board' vessels at the port of Huron, Ohio, and intended for shipment to some point beyond the State undetermined at time of shipment, and, for convenience, billed to the shippers' own order at Huron, held to be a rate affecting interstate shipment and void under the commerce clause of the Constitution as an attempt to regulate interstate commerce."

The transportation upon which Mohney was travelling, was not good outside of the State of Ohio, but was between points within the State, just as in the Worthington case, the billing was

60 from a point in the State of Ohio, to a point in the State of Ohio, and not beyond the State.

In the Worthington case, the intent was to carry this coal to points beyond Huron, Ohio, and outside of the State of Ohio, and in the case at bar, the intent of Mohney was to go from Toledo, Ohio, to Pittsburgh, in the State of Pennsylvania. In the Worthington case the billing was intrastate, but the ultimate destination was beyond the State. In the case at bar, the billing or the transportation was intrastate, but the intent was to go beyond the limits of the State of Ohio. Consequen-ly, the plaintiff in the case at bar was on an interstate journey when he was injured, just as in the Worthington case, the coal was on an interstate shipment, although the billing was intrastate. Similarly in the case of the Southern Pacific Terminal Co. vs. The Interstate Commerce Commission, 219 U. S., 498, the last paragraph of the syllabus reads as follows:

"Goods actually destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State or are delivered to a carrier for transportation; this is the same whether the goods are shipped on through bills of lading or on an initial bill only to the terminal within the same State where they are to be delivered to a carrier for the foreign destination."

In this case, one of the questions involved is whether the Southern Pacific Terminal Company is subject to the Act to Regulate Commerce and whether the order of the Commission relating to shipments originating both within and without the State of Texas, but intended for transshipment abroad is a regulation within the jurisdiction of the Commission. One of the defendants, Young, is a merchant engaged in buying and selling cotton seed cakes.

61 His business consists in buying cotton seed cakes in the interior, shipping it to himself by carloads at the pier at Galveston, Texas, for export.

The purchases made by Young were for export entirely, there being no consumption of these products at Galveston, and his sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. The court says, on page 527, in reference to this situation:

"It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination. * * * The case, therefore comes under Coe vs. Errol, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation'."

There are numerous authorities referred to in the opinions of the United States Supreme Court above referred to, which bear out the

contention that we make. As these decisions are handed down by the highest tribunal of this country, they are, of course, final. We submit that in view of the decisions of the Supreme Court, holding that through billing is not necessary in order to involve goods in interstate commerce, also is a through ticket not necessary in order to involve the passenger in an interstate journey.

In the Thompson case, supra, Mr. Justice Holmes says that if the pass is "free" or "a gratuity" then the injured passenger or his
62 representatives are bound by the stipulations as to releasing the company from liability.

Without quoting at length from the opinion in the Thompson case, we submit that the law as to liability for injuries to persons using a free pass on an interstate journey, is definitely fixed by that decision and is applicable to the case at bar.

The questions in this case are such that we submit that it is of the utmost importance that both carriers and passengers have the benefit of a final ruling by this court, and that the motion to certify the record herein should be granted.

Respectfully submitted,

DOYLE & LEWIS,
*Attorneys for Plaintiff in Error.*

63 *Docket Entries.*

Supreme Court of Ohio, January Term, 1918.

No. 15925.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff in Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

*Action.*

Motion for an order directing the Court of Appeals of Lucas County to certify its record.

Error to the Court of Appeals of Lucas County. (Const. Question Claimed.)

Attorneys for plaintiff in error: Doyle & Lewis, Toledo, Ohio.
Attorneys for defendant in error: Miller, Miller, Brady & Seeley, Toledo, Ohio.

*Fees and costs:*

Petition: $5.00 paid by Doyle & Lewis
Motion: 2.00 paid by Doyle & Lewis
Motion: 2.00 paid by Miller, Miller, Brady & Seeley.

*Memoranda of Pleadings Filed, Writs Issued, Judgments, Orders, and Decrees.*

1918.

Apr. 1. Motion for an order directing Court of Appeals to certify its record, notice and proof of service, filed.
1. Printed copies of motion and plaintiff's brief in support of motion, filed.
10. Petition in Error, waiver of summons, original papers and bill of exceptions, filed.
10. Printed Record (12) filed.
16. Defendant's printed briefs on motion to certify filed.
23. Motion for an order directing the Court of Appeals of Lucas County to certify its record—Overruled—J. 28-66.
30. Certified copy of entry sent to Clerk (Entry Held).
May 7. Motion by defendant to dismiss petition in error and acknowledgment of service filed.
7. Letter submitting motion on briefs filed.
16. Plaintiff's briefs on motion to dismiss and proof of service filed.
20. Defendant's brief on motion to dismiss and proof of service filed.
June 11. Motion by defendant to dismiss petition in error in Cause No. 15925 on the General Docket—Allowed.—J. 28-93.
18. Certified copies of entries sent to Clerk.
18. Original papers and bill of exceptions sent to Clerk.

64 *Journal Entries.*

No. 15925.

April 23, 1918.

Motion No. 9785.

THE NEW YORK CENTRAL RAILROAD COMPANY

vs.

WILBUR H. MOHNEY.

Motion for an Order Directing the Court of Appeals of Lucas County to Certify Its Record.

It is ordered by the Court that this motion be and the same hereby is, overruled.

Journal No. 28, page 66.

June 11, 1918.

Motion No. 9822.

THE NEW YORK CENTRAL RAILROAD COMPANY,
vs.
WILBUR H. MOHNEY.

Motion by Defendant to Dismiss Petition in Error in Cause No. 15925 on the General Docket.

It is ordered by the Court that this motion be and the same hereby is allowed, and that the petition in error herein be, and the same hereby is, dismissed.

It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended taxed at $—.

Journal No. 28, page 93.

STATE OF OHIO,
*City of Columbus, ss:*

I, Frank E. McKean, Clerk of the Supreme Court of Ohio do hereby certify that the foregoing motion for an order directing the Court of Appeals of Lucas County to certify its record, and brief in support of same, and the foregoing printed copy of the record are true and correct copies of the motion, brief, and printed record, in Case No. 15925, The New York Central Railroad Company v. Wilbur H. Mohney, filed in my office; and that the foregoing transcript of docket and journal entries *are* truly taken and correctly copied from the Records of the Supreme Court of Ohio; and I further certify that said motion, record and transcript constitute a true and correct transcript of the proceedings in said cause in the Supreme Court of Ohio.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 8th day of August A. D. 1918.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk of Supreme Court of Ohio,*
By SEBA H. MILLER,
*Deputy Clerk.*

65 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals, Lucas County, State of Ohio, Greeting:

Being informed that there is now pending before you a suit in which The New York Central Railroad Company is plaintiff in error, and Wilbur H. Mohney is defendant in error, No. 15925, which suit was removed into the said Court of Appeals by virtue of a writ of error to the Court of Common Pleas of Lucas County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United
66 States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

STATE OF OHIO, *ss:*

Court of Appeals for the County of Lucas.

I, William F. Renz, Clerk of the Court of Appeals, County of Lucas, State of Ohio, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 5th day of November, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

In the Court of Appeals, Lucas County, Ohio.

C. A. 628. C. P. 74018.

THE NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff-in-Error,

vs.

WILBUR H. MOHNEY, Defendant in Error.

*Stipulation.*

It is hereby stipulated that the transcript already filed, in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as a return to said writ, dated the 31st day of October, 1918.

JOHN H. DOYLE,
DOYLE & LEWIS,
*Counsel for The New York Central Railroad Company.*
ALBERT H. MILLER,
MILLER, MILLER, BRADY & SEELEY,
*Counsel for Wilbur H. Mohney.*

Dated the 5th day of November, 1918.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof, Witness my official seal, signature and the seal of said Court of Appeals, County of Lucas, State of Ohio, at the city of Toledo in said County this 5th day of November, A. D. 1918.

[Seal the Court of Appeals of Ohio, Lucas County.]

W. F. RENZ,
*Clerk, Court of Appeals, County of Lucas, State of Ohio,*
By M. E. THEUERKAUFF,
*Deputy Clerk.*

67 [Endorsed:] File No. 26723. Supreme Court of the United States, October Term, 1918. No. 637. The New York Central Railroad Company vs. Wilbur H. Mohney. Writ of Certiorari.

68 [Endorsed:] File No. 26723. Supreme Court U. S., October Term, 1918. Term No. 637. The New York Central Railroad Co., Petitioner, vs. Wilbur H. Mohney. Writ of certiorari and return. Filed November 7, 1918.